

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2004-267-E

IN RE:)	
)	
PETITION OF COLUMBIA ENERGY LLC)	SCE&G'S MEMORANDUM
FOR A DECLARATORY ORDER)	IN REPLY TO COLUMBIA
CONCERNING AGREEMENT WITH)	ENERGY'S MEMORANDUM
SCE&G FOR WAIVER OF QUALIFYING)	IN OPPOSITION TO SCE&G'S
FACILITY STATUS)	MOTION FOR A STAY
_____)	

South Carolina Electric & Gas Company ("SCE&G") submits this memorandum in reply to the January 24, 2005 memorandum of Columbia Energy LLC ("Columbia Energy") opposing SCE&G's December 14, 2004 motion for a stay in the above-captioned docket. SCE&G's motion seeks a stay of the instant proceeding during the pendency of an appeal in a parallel action now before the South Carolina Court of Appeals that addresses an issue which is at the heart of the instant proceeding – the Commission's jurisdiction in breach of contract actions. Because the opinion of the Court of Appeals in the appeal of the related circuit court matter may be dispositive of the instant proceeding, SCE&G's motion for stay should be granted.

Tellingly, nowhere in Columbia Energy's memorandum does it dispute that the issues raised in the instant proceeding will be potentially disposed of by the Court of Appeals' decision, or that judicial economy will be served by awaiting the appellate court's determination of those issues. Nonetheless, SCE&G feels compelled to respond to two points raised in Columbia Energy's memorandum in opposition.

First, Columbia Energy suggests that SCE&G has “failed to follow procedural rules.” (Columbia Energy’s Mem. Opp’n SCE&G’s Mot. Stay at 1.) However, while the procedural posture of this dispute is admittedly somewhat tortuous, it is Columbia Energy, not SCE&G, which has misapprehended the procedural rules. SCE&G craves reference to the recitation of the procedural history contained in its December 14, 2004 motion for stay. That description makes clear that two parallel actions currently are pending that involve virtually the same issues arising from Columbia Energy’s breach of the Settlement Agreement – one action that was originated in circuit court by SCE&G and is currently on appeal to the South Carolina Court of Appeals, and the instant proceeding that was brought in the Commission’s original jurisdiction by Columbia Energy.¹ However, Columbia Energy seeks to meld the two parallel matters into one by asserting that SCE&G should have obtained a writ of supersedeas from either the circuit court or the court of appeals in the judicial action to restrain the Commission from acting in this administrative matter. Such a suggestion is without merit; although the two matters are related in that they involve the same issues, they are still separate, independent proceedings. A writ obtained in a judicial proceeding would not restrain action in an administrative proceeding brought within an agency’s original jurisdiction. Consequently, the proper procedure to further the interests of judicial economy and prevent this Commission from adjudicating issues which may ultimately be decided by the Court of Appeals is for the Commission to stay the instant proceeding and await the Court of Appeals’ decision in the related, but separate, appeal. See

¹ SCE&G does not concede that the Commission has jurisdiction over the issues raised in Columbia Energy’s petition, but is merely describing the procedural origin of the instant proceeding.

Rush v. Thompson, 203 S.C. 106, 112, 26 S.E.2d 411, 413 (1943); see Talley v. John-Mansville Sales Corp., 285 S.C. 117, 328 S.E.2d 621 (1985).

Similarly, Columbia Energy's presupposition that Judge John's order had an impact upon the instant proceeding is erroneous. Judge John was fully aware of the pendency of the instant proceeding but specifically declined to reference this proceeding in his order, electing instead to remand two specific issues to the Commission for determination.² Contrary to Columbia Energy's assertions, SCE&G does not concede that the circuit court order is not automatically stayed in accordance with the appellate rules. (See SCE&G's Mot. Stay at 3 n.1).³ However, again, the automatic stay which results from the appeal does not affect this related, but separate, proceeding. Consequently, SCE&G has properly moved this Commission for a stay in the above-captioned docket.

Similarly without substance is Columbia Energy's criticism of SCE&G's discussion of the Heinz case. The FTC order posted on LEXIS appears to include the cited memorandum as part of the order. The parenthetical noted in SCE&G's motion for a stay – that the FTC stayed its administrative proceeding pending the outcome of a collateral appellate decision – is straight from the text of the FTC order. The other citations and quotations formed the basis for the FTC's decision, which, interestingly, Columbia Energy does not challenge. The important point for this Commission is that the record in the Heinz case, whether specifically included in the

² In a proposed order submitted to Judge John, Columbia Energy referred to this docket proceeding as the docket in which the issues remanded by Judge John would be decided. Judge John rejected that language, removing it from the order that was filed. Here, Columbia Energy seeks to do indirectly what Judge John specifically declined to do directly.

³ The Commission has not opened a docket to address the questions referred to it by the circuit court, which is consistent with the automatic stay provision.

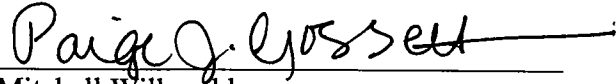
actual FTC order or not, demonstrates that the FTC stayed an administrative proceeding because of the existence of a pending appellate action in the courts. See In re: H.J. Heinz Co., FTC Docket No. 9295, 2001 LEXIS 6 (Jan. 17, 2001) (Order and Memorandum); Pretrial Conf. Trans. 9:1-25, 10:1-13 (Dec. 20, 2000) (attached hereto as Exhibit A). The Commission should act similarly here.

Accordingly, the Commission should reject Columbia Energy's attempts to meld the appeal of the circuit court action with the instant proceeding, which is a wholly separate action. The granting of a stay in the instant proceeding will avoid redundant proceedings, as the decision of the Court of Appeals in the parallel matter could have the effect of disposing of the issues raised in this docket.

SCE&G further submits that, should the Commission desire to hear oral argument on SCE&G's motion for a stay, such argument should be scheduled separately from and prior to a hearing on SCE&G's motion to dismiss. The granting of the stay would delay, and possibly moot, the need to address the motion to dismiss, and judicial economy would not be served by the parties and the Commission having to prepare to address two motions when the first could moot the second.

For the foregoing reasons, SCE&G requests that the Commission impose a stay of this proceeding until a final resolution of the appeal of Civil Action 2004-CP-09-095 currently pending before the Court of Appeals.

Respectfully submitted,



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South Carolina Electric & Gas Co.

Columbia, South Carolina
January 25, 2005

In The Matter Of:

H.J. HEINZ COMPANY
MATTER NO. D09295

PRETRIAL CONFERENCE
December 20, 2000

For The Record, Inc.
Court Reporting and Litigation Support
603 Post Office Road
Suite 309
Waldorf, MD USA 20602
(301) 870-8025 FAX: (301) 870-8333

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Page 3

(1) FEDERAL TRADE COMMISSION
(2) INDEX
(3)
(4)
(5) PRETRIAL HEARING --- Page No. 4
(6)
(7)
(8)
(9)
(10)
(11)
(12)
(13)
(14)
(15)
(16)
(17)
(18)
(19)
(20)
(21)
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Page 4

Page 2

(1) UNITED STATES OF AMERICA
(2) FEDERAL TRADE COMMISSION
(3)
(4) In the Matter of:)
(5) H.J. HEINZ COMPANY,) Docket No. 9295
(6) a corporation,)
(7)
(8) MILNOT HOLDING CORPORATION,)
(9) a corporation,)
(10) and)
(11) MADISON DEARBORN CAPITAL)
(12) PARTNERS, L.P.,)
(13) a limited partnership)
(14)
(15) Wednesday, December 20, 2000
(16)
(17) Federal Trade Commission
(18) Room 532
(19) 600 Pennsylvania Avenue, N.W.
(20) Washington, D.C. 20850
(21)
(22) The above-entitled matter came on for
(23) prehearing conference, pursuant to notice, at 2:00 p.m.
(24)
(25) THE HONORABLE JUDGE D. MICHAEL CHAPPELL

PROCEEDINGS

(1)
(2)
(3) JUDGE: For the record this is a hearing
(4) conference or a hearing in Docket 9295. I'll hear
(5) appearances from the parties now starting with the
(6) Government.
(7) MR. DAGEN: Richard Dagen, Your Honor. I'm
(8) sorry about the voice. It's not appearing with me today.
(9) MR. BALTO: David Balto.
(10) MS. McENERY: Rosemary McEnery for H.J. Heinz
(11) Company, Respondent.
(12) MR. KASS: Colin Kass for Milnot Holding
(13) Company and Madison Dearborn Partners, L.P.
(14) MR. CARSON: Dylan Carson also for H.J. Heinz.
(15) JUDGE: So, you're representing Milnot and
(16) Madison?
(17) MR. KASS: That's correct, Your Honor.
(18) JUDGE: Okay. Has everyone had a chance to
(19) look over the draft scheduling order?
(20) MS. McENERY: Yes, Your Honor.
(21) JUDGE: Well, before I get to that, I always
(22) give the attorneys a chance, if you'd like, to make a
(23) statement to summarize your position in the case. I
(24) always offer that if — does anyone want to do that?
(25) MR. DAGEN: We could.

Page 5

(1) MS. McENERY: We —
(2) MR. DAGEN: Did you want to bring up your other
(3) issue first?
(4) MS. McENERY: I will. We have confirmed — if
(5) I might, Your Honor?
(6) JUDGE: Sure. Could you come to the podium?
(7) We have — so everybody can hear.
(8) MS. McENERY: Mr. Dagen's voice has escaped him
(9) today, but we conferred earlier with complaint counsel
(10) and we are in agreement. We requested, and they agreed,
(11) the complaint counsel agreed, that we, the respondent,
(12) would like the opportunity to file a motion to stay the
(13) administrative proceedings pending the appeal of this
(14) matter at the D.C. Circuit, which is currently on
(15) expedited review. Our briefs are due in the matter next
(16) week. The Government's briefs are due just over a week
(17) thereafter and oral argument in the expedited appeal is
(18) scheduled for February 12th.
(19) So, they have — complaint counsel agreed with
(20) our request for an opportunity to file that stay motion
(21) with you and they have — they will not oppose our
(22) motion.
(23) So, our position here is that we — before we
(24) get to entering a scheduling order, we be allowed to
(25) present that motion to you.

Page 6

(1) JUDGE: Is that motion drafted?
(2) MS. McENERY: We would just — what we'd like,
(3) Your Honor, is a little opportunity to do so. We are
(4) under a gun in this proceeding. The scheduling is not of
(5) our making. We're filing a brief next week responding
(6) both to the Government's brief on appeal — it's FTC's
(7) appeal of the case — as well as an amicus brief brought
(8) by 36 or so State Attorneys' General.
(9) So, I might just ask, out of fairness, that we
(10) be given a bit of time to file that early in January
(11) right after our brief is due, if we might.
(12) JUDGE: Well, I understand that you have
(13) briefing deadlines, but everyone here needs to understand
(14) also that I have a deadline. Once the Government issues
(15) the complaint, I have a statutory deadline to have a
(16) trial, to have an opinion out, to have the decision
(17) rendered. So, we all have deadlines.
(18) MS. McENERY: I understand that, but —
(19) JUDGE: And just so you'll know, my intent was
(20) to move this along because I assumed that the parties
(21) would like to push this case up rather than delay it.
(22) MS. McENERY: My understanding, Your Honor,
(23) under the FTC's rules is that your requirement for a time
(24) table is tolled during the pendency of the appeal and you
(25) have specific authority to stay the administrative

Page 7

(1) proceedings under Rule 3.51.
(2) JUDGE: That — and I don't disagree with you.
(3) I'm just going to have to research that and make sure
(4) that this tolls my one-year deadline.
(5) MS. McENERY: It doesn't —
(6) JUDGE: Because it doesn't behoove any of us to
(7) get — and I understand if parties are attempting to
(8) merge, people want to get this thing resolved, they want
(9) to know whether they can merge or not merge, and, you
(10) know, I think for the benefit of everyone, we need to
(11) move along. But if everyone wants this stayed, then I
(12) will consider that. But I do like to have — you know,
(13) that needs to be in writing.
(14) MS. McENERY: We will — and we'd like to
(15) formally put that in writing for your benefit to outline
(16) our position. The rule is — that I'm reading from is
(17) 3.51, Your Honor. It's buried in the middle of a
(18) paragraph, but 3.51 under Initial Decision, middle of the
(19) paragraph.
(20) JUDGE: Are you reading from the latest C.F.R.?
(21) Is that your cite?
(22) MS. McENERY: I believe I am, sir. My C.F.R.,
(23) it's page 70. The sentence I'm referring to begins with,
(24) the pendency of any collateral Federal Court proceedings
(25) that relate to the administrative adjudication shall toll

Page 8

(1) the one-year deadline for filing the initial decision.
(2) JUDGE: It's going to be the Government's
(3) position that this is a collateral proceeding to the
(4) Federal proceeding?
(5) MR. DAGEN: We —
(6) JUDGE: I mean, I'm going to leave it to the
(7) parties to bring me within the confines of this rule.
(8) MR. DAGEN: Your Honor, I have not looked at
(9) the rule that they have cited. They indicated they would
(10) like to seek a stay. A similar stay was sought to which
(11) the complaint counsel did not oppose in the Poplar
(12) Bluff's case. So, I'm aware that it has occurred. I'm
(13) not aware of this particular citation.
(14) JUDGE: You probably don't have the docket
(15) number, but when was that case, Poplar Bluff?
(16) MR. DAGEN: The docket number is 9289.
(17) JUDGE: That's probably recent then. Okay.
(18) MR. DAGEN: Yes. That was Tenet Health Care
(19) and Poplar Bluff, before Judge Timony.
(20) JUDGE: Oh, Tenet Health Care.
(21) MR. DAGEN: Right.
(22) JUDGE: I didn't recognize it as Poplar.
(23) Well, I'm amenable to listening — do you want
(24) to argue that now or you just want to let me know it's on
(25) the way? How do you want to proceed?

Page 9

[1] MS. McENERY: I would like to put that to you
[2] formally in writing and outline that proceeding. I would
[3] just like the opportunity to do that, to outline our
[4] position in that motion. That would be joined by both
[5] respondents.
[6] JUDGE: Okay. Now, is that going to be a joint
[7] motion joined by complaint counsel or just not opposed?
[8] MR. DAGEN: We will not be opposing it.
[9] JUDGE: All right.
[10] MR. DAGEN: We are prepared to move forward.
[11] But given that it's the parties' desire — the merging
[12] parties' desire to wait, and our understanding is, I
[13] guess, potentially reevaluate going forward at the end of
[14] the appellate decision if it, in fact, reaffirms what was
[15] stated in the emergency stay position, then it might, in
[16] fact, preserve resources on a going-forward basis.
[17] JUDGE: Okay.
[18] MS. McENERY: I can address that directly. Mr.
[19] Dagen is correct. If the Appellate Court reverses the
[20] decision of the District Court, which denied the
[21] preliminary injunction, this transaction will be
[22] abandoned and we'll come to you with a motion to dismiss
[23] this as moot.
[24] JUDGE: Did I hear that right? If the District
[25] Court is reversed?

Page 10

[1] MS. McENERY: That is correct. The District
[2] Court —
[3] JUDGE: I thought if the District Court was
[4] reversed, then they would have the stay they wanted, the
[5] injunction they wanted.
[6] MS. McENERY: Yes. If an injunction enters, we
[7] will abandon the transaction.
[8] JUDGE: Oh, the merger will be abandoned?
[9] MS. McENERY: Correct, Your Honor.
[10] JUDGE: Okay. That's what I didn't understand.
[11] MS. McENERY: Thus obviating the need for
[12] administrative proceedings.
[13] JUDGE: Okay. Well, this is interesting. But
[14] you understand I needed to get this on the record because
[15] I do have the one-year time period which is sacred. I
[16] know there's a 60-day, but I don't consider that part of
[17] the rule. I get them out in a year if I can.
[18] MS. McENERY: Yes, Your Honor, that's why I
[19] wanted to be prepared to give you that citation for your
[20] benefit.
[21] JUDGE: And you have a brief due, what, the
[22] 29th?
[23] MS. McENERY: The 29th unfortunately, yes, Your
[24] Honor, with the D.C. Circuit.
[25] JUDGE: Is that en banc or is it just —

Page 11

[1] MS. McENERY: A three-judge panel, Your Honor.
[2] JUDGE: All right. So, is it the parties'
[3] desire then to hold off on this scheduling order until
[4] that works its way through the system?
[5] MS. McENERY: Yes, Your Honor.
[6] JUDGE: Is the Government amenable to that?
[7] MR. DAGEN: If the stay is granted, yes, I
[8] think we could wait and deal with the scheduling order at
[9] that time.
[10] One aside, Your Honor, in terms of the
[11] scheduling order, I noticed we may have a little more
[12] time than it set forth here. I think this contemplates
[13] an April 3rd trial date which would, I think, be if the
[14] merging partners have requested fast track, which my
[15] understanding is they did not.
[16] JUDGE: No.
[17] MR. DAGEN: So, we might not —
[18] JUDGE: Well, if they had requested fast track,
[19] you would have had a February trial date.
[20] MR. DAGEN: My understanding is — I may be
[21] wrong. I haven't worked under the new rules. But my
[22] understanding is that the ID would have to be out a year
[23] from the complaint.
[24] JUDGE: Well, it's always a year. Fast track
[25] is six months.

Page 12

[1] MR. DAGEN: Right.
[2] JUDGE: It has to work through the entire
[3] system in 13 months.
[4] MR. DAGEN: Okay. So —
[5] JUDGE: But I'm — right now, I'm contemplating
[6] how I'm going to comply with the statute. I have to get
[7] an order out — first of all, so it's clear to everyone,
[8] I had to have this hearing within so many days of the
[9] last answer being filed. Then I've got to have an order
[10] — a scheduling order out in ten days from today. And
[11] I'm wondering how that's going to affect if I hear the
[12] motion to stay.
[13] Well, if I issue a scheduling order, then I'd
[14] just let everyone know, if the stay is granted, then the
[15] scheduling order's off the table and we'll do another one
[16] later. But I have a statutory obligation to issue an
[17] order two days from today.
[18] MS. McENERY: And, Your Honor, if I might, the
[19] — in Rule 3.21(c)(2), for good cause, you can extend any
[20] of these dates including C, which is the requirement that
[21] you issue an order two days after this scheduling
[22] conference.
[23] My view is that our — the agreement of the
[24] parties that we file a stay motion is good cause to
[25] extend the time for issuing the scheduling order until we

Page 13

[1] know what happens on the stay request. I'm reading —
[2] JUDGE: 3.22?
[3] MS. McENERY: I'm reading 3.21(c)(2), Your
[4] Honor.
[5] JUDGE: Well, no, the — I don't agree with
[6] your interpretation. That is a date already having been
[7] set in a scheduling order. That allows me, for example,
[8] to extend the discovery deadline or a filing deadline,
[9] not the initial scheduling order that has to go out. So,
[10] I couldn't — that's not a safe refuge for me. I'm not
[11] saying that's a problem, I'm just saying I don't think
[12] that rule applies to the initial order.
[13] That rule, as has been used in the past, the
[14] order's already out, three or four months down the road
[15] someone needs some relief based on an emergency or some
[16] unforeseen circumstance, then I will extend the deadline
[17] within the scheduling order already issued.
[18] MS. McENERY: The trouble we have with a — we
[19] have a record in this case. The trouble we have with the
[20] scheduling order as proposed or any proposed order at
[21] this point is we're kind of flying blind. We need to
[22] know what complaint counsel intends to do in this
[23] proceeding beyond what the record is as it exists. And
[24] based on what new discovery or witnesses or experts or
[25] work they want to do in this forum, only then can we know

Page 14

[1] what sort of discovery and what kind of time that would
[2] take so that we can meaningfully respond to a scheduling
[3] order.
[4] So, at this point, our position is that this
[5] scheduling order is premature and we would rather proceed
[6] with the motion for stay, which I think will obviate the
[7] need for it. But beyond that, if we have to get to a
[8] scheduling order, we need to do it based on our knowledge
[9] of how the complaint counsel intends to proceed before we
[10] can meaningfully address that.
[11] The order contemplated appears to presuppose
[12] that we're going to rest on the record below in the
[13] District Court, and I haven't heard from complaint
[14] counsel that they intend to rest on the existing record.
[15] JUDGE: Actually, it didn't presuppose that.
[16] It allowed what I thought would be adequate discovery for
[17] a case of this type.
[18] MS. McENERY: Well, for us to list our — our
[19] preliminary witness list under this order would require
[20] us — would not be able to be amended unless for good
[21] cause shown. So that before we even know what they
[22] intend to do, whether they intend to bring in more
[23] experts, more economists or what have you, we have to
[24] list our witnesses. So, that leaves us sort of unable to
[25] really address this schedule.

Page 15

[1] We have a — you know, there's a substantial
[2] record in this case already, and under the circumstances
[3] and given the complexity of the case, we'd need more
[4] information before we could meaningfully respond to this
[5] schedule.
[6] JUDGE: So, I think what I'm hearing is your
[7] position is as a respondent, the Government having the
[8] burden of proof, you want to see their witness list and
[9] list of experts and then respond to that rather than at
[10] the same time.
[11] MS. McENERY: Yes, Your Honor.
[12] JUDGE: And that's —
[13] MS. McENERY: But the fundamental position
[14] being that it's premature at this juncture to enter a
[15] scheduling order at all because we'd like to have an
[16] opportunity to file a motion to stay.
[17] JUDGE: When would the motion to stay be filed?
[18] MS. McENERY: First week in January, Your
[19] Honor, since our brief is due in the Circuit Court the
[20] 29th of this month.
[21] JUDGE: You must be working on a lengthy motion
[22] to stay then if you're talking —
[23] MS. McENERY: No, Your Honor, I don't — the
[24] problem is we're not working on it, we're working on the
[25] Appellate Court brief. Again, this — I believe fairness

Page 16

[1] dictates we have a little time to do it. This schedule
[2] was sort of hoist upon us by the Government. They didn't
[3] bring their administrative case in July when they sued us
[4] for a PI, they brought it in November so that our answer
[5] date in this hearing fell right in the middle of our
[6] Christmas vacation briefing schedule.
[7] So, I'm just asking for time to get, again, I
[8] believe a short motion, but I'd like to thoroughly
[9] outline our position for your benefit so that you can
[10] give a considered decision on it.
[11] JUDGE: Did you have something to add?
[12] MR. DAGEN: I do have a copy of what was filed
[13] in Tenet by the respondents, which I assume would be
[14] somewhat similar to what would be here. If the Court
[15] would like we can hand this up to you. We had just taken
[16] a look at this.
[17] JUDGE: Do we have that? Yeah, we have that.
[18] Once I found out it was Tenet, I knew we had that.
[19] MR. DAGEN: Okay.
[20] JUDGE: That's a case that was originally
[21] assigned to me a couple years ago.
[22] Okay. Where we are then is the parties are
[23] going to — at least the respondents are going to submit
[24] a motion to stay pending the collateral proceeding in
[25] Federal Court. The Government is not going to oppose it.

Page 17

[1] And it's the parties' position we don't need to enter a
[2] scheduling order until after we see what happens with the
[3] stay and down the street here.
[4] You're in D.C. Court of Appeals?
[5] MR. DAGEN: Yes.
[6] MS. McENERY: Yes, sir, D.C. Circuit.
[7] JUDGE: Well, to be more efficient what I'm
[8] going to do is have a recess for 20, 30 minutes, go back
[9] and look over the rules, see what I think and then come
[10] back. So, we're going to recess for say 30 minutes and
[11] then we'll go back on the record, okay?
[12] MR. DAGEN: Okay.
[13] JUDGE: Thank you.
[14] MS. McENERY: Thank you.
[15] (A brief recess was taken.)
[16] JUDGE: We're back on the record in Docket
[17] Number 9295.
[18] Having viewed the rules, if I had a written
[19] motion to stay in front of me, I could rule on that
[20] today. Since I don't, I agree with counsel for
[21] respondent, that I can stay this proceeding under the
[22] rule. However, I'm going to wait till I get a written
[23] motion filed.
[24] What I am going to do, based on my statutory
[25] requirement to issue a scheduling order, I'm going to

Page 18

[1] issue a scheduling order, but the parties don't need be
[2] concerned. The first date of anything is going to be two
[3] months further out than it is now. So, there will be
[4] nothing required before March. So, you don't need be
[5] concerned about anything on the scheduling order. And I
[6] will meet the statutory requirement.
[7] I will favorably review a motion to stay,
[8] preferably joint, but if it's concurring — if the
[9] Government doesn't object, I would rather have it be
[10] concurring. Assuming the stay is granted, I will, at
[11] that time, vacate the scheduling order so it will go
[12] away.
[13] Is that acceptable to the parties?
[14] MS. McENERY: Yes, Your Honor. Could the order
[15] stipulate that if the stay for some reason is denied,
[16] that we would have leave to — consulting with and in
[17] agreement with — consulting with complaint counsel, that
[18] we could work out a revised schedule at that time?
[19] In other words, what you're entering is bumping
[20] this one out two months, but we still have the issue of
[21] the simultaneous requirements. And again, we would like,
[22] if we have to proceed, to be able to amend that to
[23] perhaps have — alter it slightly so that the Government
[24] comes forward first with their witness list or their
[25] proposed discovery or their proposed new evidence they

Page 19

[1] intend to pursue so that we can then respond. But if
[2] they're —
[3] JUDGE: You're saying if the stay is denied?
[4] MS. McENERY: Correct.
[5] JUDGE: Okay. What I'm telling you —
[6] MS. McENERY: If your order would just —
[7] JUDGE: What I'm telling you here on the record
[8] in front of everybody is if it is denied, then we will
[9] revisit the issue of coming up with some dates that are
[10] agreeable to everybody. I go by the book and the book
[11] says I've got to issue an order and I'm going to do that.
[12] I can vacate that order if the stay is granted.
[13] MS. McENERY: No, my only concern was knowing
[14] that we could revisit the schedule if required.
[15] JUDGE: Okay. I understand, that's not a
[16] problem.
[17] Now, when did you want to file the motion?
[18] When did you —
[19] MS. McENERY: The first week in January, Your
[20] Honor.
[21] JUDGE: How's January 10th sound?
[22] MS. McENERY: That's fine.
[23] JUDGE: How about ten days into January, is
[24] that —
[25] MS. McENERY: That's perfect, Your Honor, thank

Page 20

[1] you.
[2] JUDGE: Okay. Anything else?
[3] MR. DAGEN: No, Your Honor.
[4] JUDGE: And now, we're going to issue the
[5] order. Basically it's what you've seen, and like I said,
[6] I'm going to kick the dates out. We're going to
[7] basically insert counsel's name for service of pleadings,
[8] which I did leave out.
[9] Another thing I will mention, in the event we
[10] proceed to trial, the — we're going to have to have a
[11] protective order and just so you'll know, you know, it's
[12] to protect the documents between and amongst the parties.
[13] But what I do is I protect the third parties that may
[14] have documents involved.
[15] I also have a gatekeeping function here. I'm
[16] the gatekeeper for the public for in camera and we have
[17] some very strict in camera provisions in our rules. If
[18] you haven't practiced here before, you need to review
[19] those, because if you slip up, then the documents you
[20] filed are part of the public record. I just wanted you
[21] to be thinking about that, along those lines.
[22] I will include the in camera provisions in the
[23] protective order we ultimately will sign — or we will
[24] all agree to and I will issue in the case.
[25] MS. McENERY: There's a protective order

Page 21

[1] already entered on the record we have. Is that something
[2] that the Court and your staff will become a party to so
[3] that you could see the non-public documents already
[4] produced in this case?

[5] JUDGE: I haven't thought about that angle. I
[6] will begin my analysis with that protective order, but I
[7] know that it will need in camera provisions because they
[8] are unique to the FTC under the statute we have.

[9] MS. McENERY: Right. I'm just suggesting it
[10] might be helpful to the Court to have access to the very
[11] substantial record we already have in place in this case.

[12] JUDGE: We'll consider that. Anything further?
[13] (No response.)

[14] JUDGE: Okay. We're adjourned. Thank you.

[15] (At 2:47 p.m., the prehearing conference was
[16] adjourned.)

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Page 22

[1] CERTIFICATION OF REPORTER

[2] DOCKET/FILE NUMBER: 9295

[3] CASE TITLE: H.J. HEINZ CO., MILNOT HOLDING CO. & MADISON

[4] DEARBORN PARTNERS, L.P.

[5] HEARING DATE: DECEMBER 20, 2000

[6]

[7] I HEREBY CERTIFY that the transcript contained
[8] herein is a full and accurate transcript of the notes
[9] taken by me at the hearing on the above cause before the
[10] FEDERAL TRADE COMMISSION to the best of my knowledge and
[11] belief.

[12]

[13] DATED: JANUARY 4, 2001

[14]

[15]

[16]

SONIA GONZALEZ

[17]

[18]

CERTIFICATION OF PROOFREADER

[19]

[20] I HEREBY CERTIFY that I proofread the transcript for
[21] accuracy in spelling, hyphenation, punctuation and
[22] format.

[23]

[24]

[25]

ELIZABETH M. FARRELL

BEFORE

THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2004-267-E

IN RE:)
)
PETITION OF COLUMBIA ENERGY LLC)
FOR A DECLARATORY ORDER)
CONCERNING AGREEMENT WITH)
SCE&G FOR WAIVER OF QUALIFYING)
FACILITY STATUS)
_____)

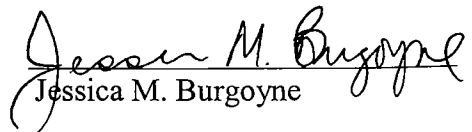
CERTIFICATE OF SERVICE

This is to certify that I, an employee of the law firm of Willoughby & Hoefer, P.A., on behalf of South Carolina Electric and Gas Co., have served this day one copy of **SCE&G's Memorandum in Reply to Columbia Energy's Memorandum in Opposition to SCE&G's Motion for Stay** upon the persons named below, at the addresses set forth, by the method indicated:

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Jessica M. Burgoyne

January 25, 2005
Columbia, South Carolina